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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. ~~1146~~ 246

EMILY SHOES, INC.,

Respondent-Plaintiff,

—against—

INTER-STATE TRUCK LINE, INC.,

Petitioner-Defendant.

PETITION FOR WRIT OF CERTIORARI

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IN THE

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OCTOBER TERM, 1956

EMILY SHOPS, INC.,
Respondent-Plaintiff,

—against—

INTER-STATE TRUCK LINE, INC.,
Petitioner-Defendant.

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Inter-State Truck Line, Inc., defendant in the State Court, respectfully prays for a writ of certiorari to review the order and judgment of the Court of Appeals of the State of New York, and that said writ of certiorari issue to said Court of Appeals and to the Supreme Court of the State of New York, County of New York, which possesses the record herein.

Opinions Below

The opinion of the trial court (Supreme Court of the State of New York, New York County) is officially reported in 207 Misc. 557 (139 N. Y. S. 2d 561) and appears at pages 1-4 of Appendix A. The Appellate Division of the Supreme Court of New York, First

Judicial Department, affirmed without opinion (1 A. D. 2d 667). The opinion of the Court of Appeals of the State of New York is officially reported in 2 N. Y. 2d 405 (141 N. E. 2d 560) and appears at pages 5-7 of Appendix A.

Jurisdiction of this Court

The order and judgment of the Court of Appeals of the State of New York which affirmed the order and judgment of affirmance of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, was dated and entered in the office of the Clerk of the Court of Appeals on March 8, 1957. The order making the order and judgment of the Court of Appeals the order and judgment of the Supreme Court of the State of New York, County of New York, was dated and entered in the office of the Clerk of the Supreme Court of the State of New York, County of New York, on March 14, 1957. The judgment entered on the Remittitur of the Court of Appeals to the Supreme Court of the State of New York, County of New York, affirming the judgment of affirmance of the Appellate Division of the Supreme Court, First Judicial Department, is dated March 15, 1957, and was entered in the office of the Clerk of the Supreme Court of the State of New York, County of New York, on March 15, 1957. The order of the Court of Appeals for the State of New York denying a timely motion for leave to reargue was dated and entered in the office of the Clerk of the Court of Appeals on April 11, 1957. The Court of Appeals of the State of New York is the highest court of that state in which a decision could be made.

Jurisdiction is conferred upon this Court by Section 1257(3) of Title 28 U. S. C. The petitioner claims rights under the Interstate Commerce Act, Title 49 U. S. C., § 20(11) *et seq.*

Questions Presented for Review

An interstate common carrier by motor vehicle supplies a shipper with a pad of bill of lading forms (36). The shipper fills out one of these forms and procures the carrier's signature thereto covering an interstate shipment (36). The shipper knows (*American Railway Express Company* v. *Lindenburg*, 260 U. S. 584, 591) that the bill of lading contains a printed provision with blank spaces for the insertion of a declared value (46-48). The shipper does not, however, use the spaces to declare a value. Instead, the shipper accepts, without objection, the bill of lading knowing that it also provides that if value is not declared, the carrier will not assume liability in excess of a specified sum. The shipper knows, too, that the carrier, in order to bring itself within section 20(11) of 49 U. S. C. permitting it to limit its liability, has filed tariffs containing rates dependent upon the declared or released value of the shipment. *Kansas City Southern Railway Company* v. *Carl*, 227 U. S. 639, 653. The shipper, knowing that under penalty of illegal discrimination the carrier can not lawfully enter into a private agreement for a transportation charge at variance with its filed tariffs (*Keogh* v. *Chicago & Northwestern Railway Company*, 260 U. S. 156, 163), nevertheless agrees with the carrier that the latter may charge a sum in excess of the legal tariff rate (38, 40-42). A partial loss having there-

after occurred in transit, the following questions have arisen in the ensuing litigation before the courts of New York State:

1. Is a state trial court, in the light of The National Transportation Policy and the Interstate Commerce Act which seek to secure equality of treatment to all shippers by preventing departures from filed tariffs and other discriminatory practices, entitled to give effect to what it conceives to be *equities* thought to result from an interstate carrier's conduct and hold that the carrier is estopped or precluded thereby from invoking the provisions of the bill of lading, the filed tariffs, and the applicable sections of the Interstate Commerce Act?

2. May a state court, for the purpose of construing a contract of carriage under the Interstate Commerce Act, give effect to an illegal and discriminatory private agreement between the parties when the paramount public policy, as enunciated in the Act, declares such an agreement null and void and of no effect whatever?

3. Does a provision in a bill of lading issued by an interstate carrier providing that the carrier's liability will be limited to a specified amount where a value is not inserted in the bill of lading constitute a released valuation agreement in writing within section 20(11) of Title 49 U. S. C. (Appendix B, pp. 1-4) where the carrier has satisfied the statutory requirements by obtaining authorization from the Interstate Commerce Commission for the establishment of "rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property" and has filed tariffs showing such rates?

The Statutes Which This Case Involves

The National Transportation Policy, Act Sept. 18, 1940, ch. 722, Title I, § 1, 54 Stat. 899; Title 49 U. S. C. § 20(11); § 316(b), (d); § 317(a), (b); § 319; § 322(a), (c). The relevant provisions of these statutes appear in Appendix B of this petition.

Statement of the Case

The action was for breach of contract of carriage involving loss of part of an interstate shipment (14-20). All facts and documents were stipulated (34-45). Respondent-shipper claimed petitioner-carrier was liable for the full value of the property lost. Petitioner, while admitting its liability, timely raised the federal questions presented here for review by pleading, in its answer, that the shipment was received subject to the terms and conditions of its bill of lading, tariffs and the applicable statutes of the Interstate Commerce Act; and that by reason thereof, its liability was limited to an agreed valuation (23-26, 44-45).

We have hitherto alluded briefly to certain of the salient facts in order to frame properly the questions presented for review. The bill of lading limitation referred to therein, which was accepted without objection by the shipper, provided in solid caps:

> "WHEN VALUE IS NOT DECLARED, CARRIER WILL NOT ASSUME ANY LIABILITY IN EXCESS OF 50 CENTS PER POUND, OR 50 DOLLARS MINIMUM." (Stipulation, Ex. A, R. p. 17)

The Proceedings in the Courts Below

The trial judge expressly recognized, as conceded by the shipper, that the foregoing provision constituted a released valuation agreement, and that the carrier had the right to limit its liability under such a valuation agreement (Appendix A, pp. 1-3). He said, "The bill of lading contained a release of value under the terms of which the 'carrier will not assume any liability in excess of 50 cents per pound, or 50 dollars minimum' " (Appendix A, pp. 1-2). He also recognized that the carrier's tariffs provided for a specific freight charge for such released value agreements. "Under the applicable tariffs * * * the freight charge for the shipment should have been $34.59 if, *as was the case*, it was released to specific or maximum value" (Appendix A, p. 2). He noted, too, in his opinion, that a higher freight charge would have been due, under those tariffs, had there been no released valuation (Appendix A, p. 2). Nevertheless, despite the apparent recognition of the legal significance of these uncontroverted record facts, the trial judge concluded that the valuation agreement and the tariff choice of rates could not be given effect; that they must be disregarded by the court because, the opinion says, the carrier, by its conduct, disregarded them; and "Having completely ignored the law, the defendant should not be permitted to profit by the limited liability provisions contained in that law" (Appendix A, p. 3).[1]

[1] The assumption that the carrier alone was at fault is a basic misconception. The parties were *in pari delicto*. They "agreed" to the flat arbitrary charge (38). The shipper knew that the shipment was "Received, subject to the classifications and tariffs in effect" on the date of the shipment (46-48). The shipper knew the tariff rates under which it was shipping. *Kansas City*

The conduct "in disregard of the law" was the *flat sum* charge. It was, in the view of the court at Trial Term, no rate at all; and because of that, the court concluded, plaintiff-shipper was afforded no choice of rates. The court said:

> "The flat sum deal made by this defendant was not a choice of rates either at common law or under the Interstate Commerce Act. Where the statute and the rates are completely disregarded and there is actually no choice of rates, the liability limitations of the statute do not apply" (Appendix A, p. 4).

This is startling. Its implications are so far reaching and subversive of the settled law of interstate commerce carriers as to call for the intervention of this Court. The trial court's decision means that shippers and common carriers, in making contracts for the interstate transportation of property can, by a private agreement between themselves, prevent the application of the interstate commerce laws and the tariffs regulating such transportation.

Equally important is the patent and flagrant discrimination sanctioned by the trial court in giving binding effect to an agreed but unauthorized overcharge. The great purpose of the Interstate Commerce Act was to provide equality of treatment for all shippers through the elimination of discriminations and preferences in any form whatever. Here the shipper, by the trial court's decision, was actually the victim (although a willing one) of a discrimina-

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Southern Railway Company v. *Carl*, 227 U. S. 639, 653. It knew, or was charged with knowing, that the discriminatory charge was illegal and unlawful. 49 U. S. C., Section 316(d).

tion. The shipper was not given the same rate treatment accorded other shippers making the same released valuation agreement and for which they would pay *only* the reduced tariff rate. On the other hand, those other shippers, having abided by the tariffs and having paid the legal released rate, could (on the same bill of lading and for the same loss) recover only the released value. Consequently, such other shippers would *not* be given *the same equal treatment* to which *all* shippers are entitled by statute—because the shipper herein, by agreeing to a charge which violated the tariff rate, was (by reason of such illegal agreement) permitted to recover the *full* value, instead of the *released* value contracted for in the tariff and bill of lading. Thus the shipper herein was given a preference over such other shippers. Cf. *Kansas City Southern Railway Company* v. *Carl*, 227 U. S. 639, 652.[2]

The decision of the trial court was without precedent or warrant, but it went unrebuked and unchallenged by the Appellate Division of the Supreme Court of New York, First Judicial Department. The latter court wrote no opinion in affirming the judgment of the trial court. On further appeal by petitioner to the Court of Appeals for the State of New York, the state's court of last resort, that court unanimously affirmed, in a per curiam opinion. It made no effort to correct the pronouncements of the

[2] Counsel for petitioner holds no brief for the conduct of the petitioner and respondent in the mutual agreement (37-38) to pay and accept an excessive charge. The reasons which prompted that agreement are not in the record, nor are they known to counsel for petitioner. Counsel for petitioner would be remiss in his duty as a member of the bar of this Court, however, if he failed to point out the real inequities resulting from the trial court's decision as compared to the fancied inequities which the trial court apparently sought, indiscriminately, to remedy.

trial court as to the binding effect of the private agreement for an overcharge. Indeed, it condoned the trial court's basic impairment of the parties' federal rights by using, similarly, the illegal agreement for an overcharge as an aid to construction of the contract of carriage.[3]

The per curiam opinion of the Court of Appeals opens by quoting the following clause from the bill of lading:

> "When value is not declared, carrier will not assume any liability in excess of 50¢ per pound, or 50 dollars minimum."

Because the shipper chose not to *write into* the blank spaces provided therefor in the bill of lading any *special* value for the goods, the per curiam opinion makes the deduction (with which we agree) that "The situation is that which is described in the bill of lading as occurring 'when value is not declared' ". From these premises the per curiam opinion draws the conclusion (with which we do not agree) that:

> "No value having been declared, the bill of lading does not constitute an agreement that the goods were worth any particular amount."

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[3] The trial court regarded the agreement for a flat sum of $115.00 as being no rate at all, thereby concluding that the shipper was given no choice of rates (Appendix A, p. 4). The Court of Appeals, as one of its grounds for holding that the shipper was entitled to recover full value, referred to the fact that "the shipper paid more than the freight charges corresponding in the tariffs to the full value of the goods" (Appendix A, pp. 6-7). Thus we have the anomalous situation in which an agreement which is null and void, and of no effect, is used as a factor in determining the value of the shipment. Compare this concept that the *charge* determines the *valuation* with the settled rule to the contrary holding that the *rate* is dependent upon the bill of lading *valuation*. *Kansas City Southern Railway Company* v. *Carl*, 227 U. S. 639, 652.

The latter conclusion and what follows can only mean that the Court of Appeals has held that the bill of lading delivered to and accepted by the shipper does not constitute an agreement limiting the carrier's liability to 50¢ per pound.[4]

The decision of the Court of Appeals caused the editors of the New York Law Journal, without solicitation by either party, to single it out for publication on the front page of that newspaper in its May 2, 1957 issue. The interest generated by such decision and that of the trial court is understandable, since contracts for limited liability in the transportation of property in interstate commerce are widely used[5] and "their construction" consequently presents "a matter of more than individual concern" (*Calmar Steamship Corp.* v. *Scott*, 345 U. S. 427, 428). The vast bulk of passengers' trunks and baggage is transported by interstate railroads and bus lines under some form of limited liability agreement. Cf. *Boston &*

[4] This holding is contrary to the finding of the trial court upon the stipulated facts and the concession of the plaintiff. The trial court said, "The bill of lading contained a release of value" (Appendix A, pp. 1-2), and again: "*The plaintiff, while conceding the defendant's right to limit its liability, contends that the release of value contained in the bill of lading in this case is of no effect* because the defendant charged a higher rate than that applicable to a release of value shipment" (Appendix A, p. 3, italics added).

[5] Many commercial shippers carry their own transportation insurance covering them against full loss. *Appleman, Inland Marine Insurance*, pp. 5-7. Such shippers prefer to ship under limited liability agreements, thereby avoiding payment of excess transportation charges based upon full carrier's liability. *Kassvan* v. *Thomas E. McElroy Co.*, 7 Cir., 179 F. 2d 97, 99, 100. Such agreements have had the salutary effect of avoiding innumerable subrogation suits by shippers' underwriters. The latter, knowing that only the amount of the limitation could be recovered, have been content to dispose of their claims on such basis without suit. Now, however, such certainty and uniformity of carrier's liability have been cast in doubt by the decision below, and it is reasonable to suppose that underwriters will not be so loathe to sue.

Maine Railroad v. *Hooker*, 233 U. S. 97. Railway Express Agency, Inc. transports a huge volume of interstate express shipments under limited liability agreements. Cf. *Northern Fur Company, Inc.* v. *Minneapolis, St. P. & S. S. M. Ry. Co.*, 224 F. 2d 181, cert. den. 350 U. S. 900. So, too, do the motor carriers who, like petitioner, operate under Part II of the Interstate Commerce Act. Cf. *Goldstein & Leary, Inc.* v. *Arrow Carrier Corporation*, 53 M. C. C. 9; *Glickfield* v. *Howard Van Lines*, 9 Cir., 213 F. 2d 723. Thus the seed of potential discrimination, planted by the trial court herein and permitted to root without rebuke by the Court of Appeals, has a vast field of fertile soil in which to flourish.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

I

The writ should be allowed because the case is of the greatest importance to the shipping public, and the state courts of New York have decided it contrary to the applicable decisions of this Court construing and enforcing the National Transportation Policy and the Interstate Commerce Act.

(a)

The trial court held herein that the carrier should not be permitted to enforce its legal tariff rate. But, by federal statute, the carrier is required to "enforce" its just and reasonable rates, charges and classifications [Title 49 U. S. C. § 316(b)]. The trial court held that the carrier's filed tariffs, with their choice of rates, were not binding upon shipper and carrier.

Yet this Court has held that they have the force and effect of statute, binding upon shipper and carrier alike, irrespective of any lack of knowledge.

Missouri, Kansas & Texas Railway Company v. *Harriman*, 227 U. S. 657, 671;

Pennsylvania Railroad Company v. *International Coal Mining Company*, 230 U. S. 184, 197.

The trial court held that the carrier, by its excess charge in disregard of its filed rate, was estopped from enforcing the bill of lading valuation and the released rate applicable thereto. Yet the settled federal law is that "Neither the intentional nor accidental misstatement of the applicable published rate will bind the carrier or shipper" (*Kansas City Southern Railway Company* v. *Carl*, 227 U. S. 639, 653), or as held in *Texas & Pacific Railway Company* v. *Leatherwood*, 250 U. S. 478, 481:

> "The bill of lading given by the initial carrier embodies the contract for transportation from point of origin to destination; and its terms in respect to conditions of liability are binding upon the shipper and upon all connecting carriers, just as a rate properly filed by the initial carrier is binding upon them. Each has in effect the force of a statute, of which all affected must take notice. *That a carrier cannot be prevented by estoppel or otherwise from taking advantage of the lawful rate properly filed under the Interstate Commerce Act is well settled.*" (Italics added.)

See also:

Louisville & Nashville Railroad Company v. *Chatters*, 279 U. S. 320, 331;

Georgia, Florida & Alabama Ry. Co. v. Blish Milling Co., 241 U. S. 190, 197;
Keogh v. Chicago & Northwestern Railway Company, 260 U. S. 156, 163;
Louisville & Nashville Railroad Company v. Maxwell, 237 U. S. 94, 97.

Under the trial court's holding, the agreement for an overcharge in disregard of defendant's tariffs became a *binding* agreement. Yet the federal statute, section 316(d) of Title 49 U. S. C., declares that such charge "is prohibited and declared to be unlawful"; and this Court has held that any such agreement is not binding. *Kansas City Southern Railway Company v. Carl*, 227 U. S. 639, 653.

The Court of Appeals saw fit to construe the contract of carriage in the light of the illegal agreement between the parties, pointing out that the charge paid thereunder was in excess of that corresponding in the filed tariffs to the full value of the goods. Yet even if the illegal agreement could, *arguendo*, be used as an aid to construction, such reasoning puts the cart before the horse. This Court, to the contrary, has held that it is the valuation which determines the rate to be charged. *Missouri, Kansas & Texas Railway Company v. Harriman*, 227 U. S. 657, 671.

The foregoing conflict is a disturbing manifestation by the courts below of a basic misunderstanding of the national public policy which Congress has embodied in the Interstate Commerce Act. To effectuate the purpose of the Act, all forms of favoritism, departures from filed tariffs and other forms of undue discrimination are prohibited. And to insure that such

policy is not defeated, shippers and carriers are placed in figurative strait jackets, with no freedom of contract or conduct outside the four walls of the bill of lading, the filed tariffs and the pertinent sections of the Act.

National Transportation Policy (54 Stat. 899, Act of Sept. 18, 1940, C. 722, Title I, § 4) (Appendix B, p. 4);

New York, New Haven and Hartford Railroad Company v. *Interstate Commerce Commission*, 200 U. S. 361, 391;

Texas and Pacific Railway Company v. *Abilene Cotton Oil Company*, 204 U. S. 426, 439;

Keogh v. *Chicago & Northwestern Railway Company*, 260 U. S. 156, 163;

Georgia, Florida & Alabama Railway Company v. *Blish Milling Company*, 241 U. S. 190, 197;

Texas and Pacific Railway Company v. *Mugg*, 202 U. S. 242, 245;

Davis v. *Cornwell*, 264 U. S. 560, 562.

With all respect for the courts below, it is inconceivable that Congress ever intended that the national public policy should not encompass section 20(11) and its provision for released valuation agreements and released tariff rates dependent thereon. That statute is a vital and integral cog in one overall statutory plan for the regulation of interstate commerce. It brought an end to diverse state court rulings by substituting one uniform federal rule of carrier's liability. *Adams Express Co.* v. *Croninger*, 226 U. S. 491, 506. It gave shippers the right to receive a bill of lading from the initial carrier and fixed the respon-

sibility of the latter for the entire carriage. *Atlantic Coast Line Railroad Company* v. *Riverside Mills*, 219 U. S. 186. It made the carrier liable for the full actual loss of the shipment, but permitted the shipper to enter into a limitation of liability agreement with the carrier for which the former was entitled to a reduced rate. *American Railway Express Company* v. *Lindenburg*, 260 U. S. 584.

(b)

The significance of this decision by the Court of Appeals is that it undertakes to pass upon the form and sufficiency of a bill of lading which an interstate carrier contends is a limitation on its liability within the meaning of section 20(11) of Title 49 U. S. C. This Court, recognizing the importance of this statute upon the rights of parties to interstate shipments, recently granted certiorari to review a decision of the Connecticut courts thereunder. *New York, New Haven & Hartford Railroad Co.* v. *Nothnagle*, 346 U. S. 128. In that case, Mr. Justice Clark, after reviewing the statute's history, pointed out that "any limitation of liability in a bill of lading or receipt based upon an agreed amount "is voided by the Act unless saved by the statutory proviso" (p. 134). He noted that the limitation had "to qualify under the proviso as part of an authorized schedule of rates graduated according to property valuations *in writing*" (p. 134). He found that the tariffs of the carrier were in compliance therewith, but that there was no "value declared in writing by the shipper or agreed upon in writing" (p. 135), and that, "in fact,

not even a baggage check reciting a limitation provision changed hands" (p. 135). He then went on to say, at page 135:

> "But only by granting its customers a fair opportunity to choose between higher or lower liability by paying a correspondingly greater or lesser charge can a carrier lawfully limit recovery to an amount less than the actual loss sustained. *Boston & Maine R. Co.* v. *Piper*, 246 U. S. 439, 444-445 (1918); *Union Pacific R. Co.* v. *Burke*, 255 U. S. 317, 321-323 (1921); cf. *The Ansaldo San Giorgio I* v. *Rheinstrom Bros. Co.*, 294 U. S. 494, 497-498 (1935)."

Did the shipper herein have every opportunity to choose between "higher or lower liability"? Certainly, no such choice was given if, under the reasoning of the trial court, the *illegal* agreement for an overcharge is given effect. If, however, the national transportation policy requires that a scalpel be applied to sever the bad from the good, then the situation is one which must be viewed as though no such agreement had been made or overcharge paid. What then do we find? Clearly, unless *American Railway Express Company* v. *Lindenburg*, 260 U. S. 584, 591, is now to be overruled, the fact that the bill of lading with its printed limitation was accepted by the shipper without signing does not preclude such provision from being an agreement in writing within section 20(11). Manifestly, too, the use of a printed form of limitation is one which not only has received the sanction of this Court (*Great Northern Railway Company* v. *O'Connor*, 232 U. S. 508, 516), but is the usual and

customary method of effecting the statutory limitation.[6]

Certainly there is no dispute that under the stipulated facts the shipper was accorded a tariff choice of rates predicated upon limited or unlimited liability on the carrier's part (40-42, 58-59, 70-71). Moreover, the shipper, with knowledge of such tariff structure, also knew that the bill of lading provided that where value was not declared, the carrier's liability would be limited in a specified amount. Should not such provision for limited liability be given effect since the shipper, by accepting it as part of the written contract, manifested an election *not* to exercise either of two other choices available under the carrier's tariffs? The shipper could have elected (but did not) to ship at a higher value, manifesting such election by filling in the blank spaces provided in the bill of lading for a declared value. It could have refused to agree to any limited liability and have demanded carriage upon full liability in event of loss. Cf. *Magnin* v. *Dinsmore*, 62 N. Y. 35, 44 (cited with approval by this Court in *Hart* v. *Pennsylvania Railroad Company*, 112 U. S. 331, 342).

The New York Court of Appeals employed, as precedent for its judgment of affirmance, the case of *Loeb* v. *Friedman's Express, Inc.*, in which this Court denied certiorari, 331 U. S. 851, to review the judg-

[6] Cf. *American Railway Express Company* v. *Lindenburg*, 260 U. S. 584, 591; *Glickfield* v. *Howard Van Lines*, 9 Cir., 213 F. 2d 723; *Goldstein & Leary, Inc.* v. *Arrow Carrier Corporation*, 53 M. C. C. 9.

ment of the New York Court of Appeals, 296 N. Y. 1029, which affirmed the lower courts, 187 Misc. 89, aff'd 271 App. Div. 873.

The decision in the *Loeb* case is unassailably correct—which is no doubt the reason this court denied certiorari (although we are warned not to so conclude). To illustrate the distinction, the *Loeb* case should be compared with the *Nothnagle* case, 346 U. S. 128. In the *Nothnagle* case, there was no bill of lading or receipt. In the *Loeb* case the bill of lading contained *no printed provision* specifying a limitation in a definite amount in the absence of a declared value by the shipper. But the bill of lading in the case at bar does contain such a limitation. Consequently, the question as to the sufficiency of such a contractual limitation, which this Court said it did *not* have to decide in the *Nothnagle* case, *supra,* is squarely presented by this case.

Manifestly, the language of the Court of Appeals' decision, and its reliance on *Loeb* v. *Friedman's Express, Inc., supra,* raise a serious question whether it comprehended that the statute (49 U. S. C., section 20(11)) affords two alternative methods for the limitation of an interstate carrier's liability—and no other method. That liability may be limited to "the value declared in writing by the shipper," *or* "agreed upon in writing as the released value of the property" 49 U. S. C., section 20(11). The decision below manifestly decides that the first statutory alternative is the *sole* criterion of an effective limitation, totally disregarding the second alternative established by the statute, and here adopted by the parties in the form of the printed provision releasing the liability of the

carrier to a specified amount in consideration of a reduced rate.

In urging the issuance of a writ of certiorari, petitioner respectfully asks this Court to consider whether there is any substantial difference between the effect of the bill of lading limitation herein,

> "WHEN VALUE IS NOT DECLARED, CARRIER WILL NOT ASSUME ANY LIABILITY IN EXCESS OF 50 CENTS PER POUND, OR 50 DOLLARS MINIMUM"

and that held to constitute compliance with the provisions of section 20(11) permitting limitation of liability in the case of *American Railway Express Company* v. *Lindenburg*, 260 U. S. 584, wherein this Court said, at page 585:

> "The receipt, among other things, stipulated that in no event '*shall this Company be held liable or responsible, nor shall any demand be made upon it beyond the sum of fifty dollars upon any shipment of 100 lbs. or less and for not exceeding 50 cents per pound upon any shipment weighing more than 100 lbs.*, and the liability of the Express Company is limited to the value above stated unless the just and true value is declared at time of shipment, and the declared value in excess of the value above specified is paid for, or agreed to be paid for, under this Company's schedule of charges for excess value.'" (Italics added).

This Court referred to the latter provision as "the limited liability set forth in the receipt" (p. 585). This Court, dealing with the same provision in the later

case of *American Railway Express Company* v. *Levee*, 263 U. S. 19, said, at page 21:

> "* * * *the limitation of liability* was valid, whatever may be the law of the State in cases within its control. * * * Under the law of the United States governing interstate commerce the stipulation constituted a defence to liability beyond fifty dollars, unless the plaintiff should prove some facts that took the case out of the protection of the contract. It had that scope in whatever Court it came up." (Italics added).

Compare, too, the limitation in *Pierce Co.* v. *Wells, Fargo & Company*, 236 U. S. 278, 280, and the following comment of this Court at page 283:

> "That contracts for limited liability, when fairly made, do not contravene the settled principles of the common law preventing the carrier from contracting against its liability for loss by negligence (*Railroad Company* v. *Lockwood*, 17 Wall. 357, 375) was settled by this court in what is known as the *Hart Case* (*Hart* v. *Pennsylvania R. R.*), 112 U. S. 331. In that case a recovery limited to $1,200 for 6 horses, one shown to be worth $15,000 and the others from $3,000 to $3,500 each, was sustained upon the principle that the contract did not relieve against the carrier's negligence, but limited the amount that might be recovered for such negligence, and it was there held that such contracts when fairly made did not contravene public policy. That case has been frequently followed since and its doctrine applied in construing limited liability contracts in connection with the Carmack Amendment to the Interstate Commerce Act, in a series of cases beginning with the *Adams Express Co.* v. *Croninger*,

226 U. S. 491. See in this connection *Wells, Fargo & Co.* v. *Neiman-Marcus Co.*, 227 U. S. 469; *Kansas Southern Railway* v. *Carl*, 227 U. S. 639; *M., K. & T. Ry.* v. *Harriman*, 227 U. S. 657; *Chicago, Rock Island & Pacific* v. *Cramer*, 232 U. S. 490; *Boston & Maine R. R.* v. *Hooker*, 233 U. S. 97; *A., T. & S. F. Ry.* v. *Robinson*, 233 U. S. 173."

If the contract provision in each of the cited cases constituted a "limitation of liability" upon the amount of the recovery, does not the language employed in the present contract accomplish the same end? Did not the shipper, by agreeing thereto, put a ceiling upon the amount of recovery which, for all practical purposes, was the same as though a *mean* value was spelled out in so many words?[7] Was not this shipper, as this Court pointed out in *Missouri, Kansas & Texas Railway Company* v. *Harriman*, 227 U. S. 657, 671, bound to take notice of the relationship between such limitation and the filed rates?[8] In the final

[7] Such was said to be the effect of an almost identical limitation in *Magnin* v. *Dinsmore*, 62 N. Y. 35, 44, a case relied on and followed by this Court in *Hart* v. *Pennsylvania Railroad Company*, 112 U. S. 331, 342. The quotation from the *Pierce Co.* case at page 20 hereof points out how the doctrine of the *Hart* case has since been followed and applied in construing limited liability contracts under the Act.

[8] Note that the bill of lading limitation is specified to be "50 cents per pound or 50 dollars minimum". There is no dispute that this meant that if the shipment weighed 100 pounds or less, the minimum liability of the carrier would be $50.00, whereas if the shipment exceeded such weight, then the 50 cents per pound figure would apply. Compare and note the same method of computation used in the tariff base rate which is to be applied where the shipment is "Released to value not exceeding $50.00 for any shipment of 100 pounds or less, or not exceeding 50 cents per pound actual weight for any shipment in excess of 100 pounds" [Section D(a) of Rule 34, Freight Tariff No. 10-J, Ex. C., R. 70-72].

analysis, was not the limitation upon the amount of recovery the "released value" of the shipment within the statutory alternative? Cf. *Kansas City Southern Railway Company* v. *Carl*, 227 U. S. 639, 655. Indeed, could such limitation be anything else when even the plaintiff, recognizing its intent (see footnote 4 at page 10 hereof), conceded it to be a "release of value"?

Conclusion

Petitioner respectfully prays that a writ of certiorari be issued and that this Court forthwith direct that the judgment of the Court below be modified so as to hold that the parties are bound by the bill of lading, the filed tariffs and the Interstate Commerce Act, and that by reason thereof, the bill of lading in this instance provides for a valid limitation of liability in amount which has the effect of limiting the recovery of the shipper under the provisions of 49 U. S. C., section 20 (11). In the alternative, it is requested that the case be placed on the calendar for argument.

Respectfully submitted,

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APPENDIX A

Opinion of the Supreme Court of the State of New York, New York County

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

EMILY SHOPS, INC.,

Plaintiff,

—against—

INTER-STATE TRUCK LINE, INC.,

Defendant.

CORCORAN, Justice.

The parties have stipulated to all of the facts in this case.

The defendant is a common carrier by motor vehicle in interstate commerce and is a member of the Middle Atlantic States Motor Carrier Conference, Inc. It is a participating carrier in the tariffs filed with the Interstate Commerce Commission by that conference.

The plaintiff delivered merchandise to the defendant in New York to be delivered to the plaintiff in Pennsylvania. The bill of lading contained a release

of value under the terms of which the "carrier will not assume any liability in excess of 50 cents per pound, or 50 dollars minimum".

At the time of the shipment, the plaintiff and the defendant agreed upon "the flat sum of $115.00" as the freight charge. Under the applicable tariffs filed with the Interstate Commerce Commission, the freight charge for the shipment should have been $34.59 if, as was the case, it was released to specific or maximum value. Even if the shipment were not so released, and the defendant was liable for full value, the charges should have been only $69.18. The goods were lost in transit. The plaintiff claims that it is entitled to recover from the defendant the sum of $6,155.93, which is conceded to be the true value of the goods. The defendant pleads that it is liable only for the limited value placed on the goods of 50 cents a pound, which amounts to a total of $75, and for any excess freight charges it collected.

Section 20, subdivision 11, of the Interstate Commerce Act (U. S. Code, title 49, chap. 1 et seq.), is made applicable to common carriers by motor vehicle by section 319 of that title. A carrier is liable for full, actual loss, except in cases where the Interstate Commerce Commission by order authorizes the establishment and maintenance of rates "dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property * * *." In such cases the liability of the carrier under the amendment is limited to the value so declared or released. The commission's released rates order No. MC-239, applicable to the defendant, recites

that it was applied for "to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property."

The plaintiff, while conceding the defendant's right to limit its liability, contends that the release of value contained in the bill of lading in this case is of no effect because the defendant charged a higher rate than that applicable to a release of value shipment.

The defendant, on the other hand, contends that the bill of lading contained a valid agreement releasing the value of the shipment, in case of loss, to 50 cents a pound; that once the parties agreed upon such valuation, such agreement determined the particular tariff rate which applied and that such rate attached automatically to the shipment. The defendant argues that the rate does not determine whether it is a release of value shipment but that, conversely, a release of value shipment determines the rate. The plaintiff's only relief, according to the defendant, is to recover back the excess in rates charged for the shipment.

The difficulty with the defendant's position is that its charge of $115, which was more than three times the proper charge for a released value shipment, was not merely an excessive rate. It was no rate at all. The charge was "a flat sum of $115.00." A flat sum is not a rate. It is the opposite of a rate. The defendant, in doing what it did, acted as if there were no rates or tariffs, and no regulatory law. Having completely ignored the law, the defendant should not be permitted to profit by the limited liability provisions contained in that law.

Opinion of the Supreme Court of the State of New York, New York County

In *Union Pacific Railroad Co.* v. *Burke* (255 U. S., 317), the court said at page 321: "This court has consistently held the law to be that it is against public policy to permit a common carrier to limit its common-law liability by contracting for exemption from the consequences of its own negligence or that of its servants, and valuation agreements have been sustained only on principles of estoppel and in carefully restricted cases where choice of rates was given—where 'the rate was tied to the release.'"

The flat sum deal made by this defendant was not a choice of rates either at common law or under the Interstate Commerce Act. Where the statute and the rates are completely disregarded and there is actually no choice of rates, the liability limitations of the statute do not apply.

Judgment is directed in favor of the plaintiff in the sum of $6,155.93, with interest from November 30, 1953.

Opinion of the Court of Appeals of the State of New York

COURT OF APPEALS

STATE OF NEW YORK

Decided March 8, 1957

EMILY SHOPS, INC.,

Respondent,

vs.

INTER-STATE TRUCK LINE, INC.,

Appellant.

Per Curiam:

The bill of lading, issued by a common carrier by truck, read in this case:

> "When value is not declared, carrier will not assume any liability in excess of 50¢ per pound, or 50 dollars mfnimum."

Omission to mention any value of the goods in this bill of lading is non-declaration of value. The situation is that which is described in the bill of lading as occurring "when value is not declared". No value having been declared, the bill of lading does not constitute an agreement that the goods were worth any particular amount. Consequently any limitation upon liability to the shipper would have to be based upon a theory of estoppel. Any estoppel would need to be

based upon conduct by the shipper misleading to the carrier. In a case where no value was declared in a similar bill of lading, nor any freight charge paid, it was stated in an opinion by Mr. Justice BERNARD L. SHIENTAG of the Appellate Term:

> "It could not be said, therefore, that having accepted the benefit of the lower rate dependent upon a specified valuation, the shipper is estopped from asserting a higher value; nor could it be said in this case, even on the basis of a presumption of knowledge on the part of the shipper of the rate-valuation relationship, that there was anything in writing on the bill of lading to constitute an agreement as to valuation.
>
> "In order to sustain a limitation of liability in this case we should be obliged to go beyond the earlier cases and to hold that where a bill of lading in the form here used, received by the shipper and signed by him, contains a legend calling for the declared value to be stated by the shipper, which value is not inserted, that in itself is tantamount to a declaration in writing of the value of the shipment on the basis of the minimum tariff. The statutory language has no such meaning." (*Loeb v. Friedman's Express*, 187 Misc. 89, 94, aff'd. 271 App. Div. 873, aff'd. 296 N. Y. 1029.)

It is assumed here, as in the *Loeb* case, that the bill of lading is conformed by law to the provisions of the filed tariffs. Loeb had not paid any freight charges, yet she was allowed to recover full value. No different result is indicated here, where the shipper paid more

than the freight charges corresponding in the filed tariffs to the full value of the goods.

The judgment appealed from is affirmed, with costs.

CONWAY, CH. J., DESMOND, DYE, FULD, FROESSEL, VAN VOORHIS AND BURKE, JJ., Concur.

Judgment affirmed.

Order and Judgment of the Court of Appeals of the State of New York

COURT OF APPEALS

State of New York—ss.:

Pleas in the Court of Appeals, held at the Court of Appeals Hall, in the City of Albany, on the 8th day of March in the year of our Lord one thousand nine hundred and fifty-seven, before the Judges of said Court.

WITNESS

THE HON. ALBERT CONWAY
Chief Judge, Presiding

Raymond J. Cannon
Clerk

Remittitur March 8, 1957

No. 270

EMILY SHOES, INC.,

Respondent,

vs.

INTER-STATE TRUCK LINE, INC.,

Appellant.

Be it Remembered, That on the 18th day of September in the year of our Lord one thousand nine hundred and fifty-six, Inter-State Truck Line, Inc., the appellant in this cause, came here unto the Court of Ap-

Order and Judgment of the Court of Appeals of the State of New York

peals, by Bigham, Englar, Jones & Houston, its attorneys, and filed in the said Court a Notice of Appeal and a return thereto from the judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Emily Shops, Inc., the respondent in said cause, afterwards appeared in said Court of Appeals by Weintraub & Fass, its Attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. John M. Ahérne, of counsel for the appellants, and by Mr. Charles T. Weintraub, of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be affirmed, with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced ac-

cording to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York

Court of Appeals, Clerk's Office
Albany, March 8, 1957

I hereby certify that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON
Clerk

STATE OF NEW YORK
[SEAL]
COURT OF APPEALS

Order of Court of Appeals of State of New York Denying Leave to Reargue

STATE OF NEW YORK,

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the eleventh day of April A. D. 1957.

Present, Hon. Albert Conway,

Chief Judge, Presiding.

Mo. No. 169

Emily Shops, Inc.,

Respondent,

vs.

Inter-State Truck Line, Inc.,

Appellant.

A motion for a reargument of the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had:

Ordered, that the said motion be and the same hereby is denied with ten dollars costs and necessary printing disbursements.

A copy

Gearon Kimball
Deputy Clerk

State of New York
[seal]
Court of Appeals

APPENDIX B

National Transportation Policy. Act Sept. 18, 1940, c. 722, Title I, 54 Stat. 899.

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Title 49 U. S. C.

§ 20, par. (11). Liability of initial and delivering carrier for loss; limitation of liability; notice and filing of claim.

Any common carrier, railroad, or transportation company subject to the provisions of this chapter

receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory, or any common carrier, railroad, or transportation company delivering said property so received and transported shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United

States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is declared to be unlawful and void: *Provided*, That if the loss, damage, or injury occurs while the property is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water and by and under the laws and regulations applicable to transportation by water, and the liability of the initial or delivering carrier shall be the same as that of such carrier by water: *Provided, however*, That the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, to baggage carried on passenger trains or boats, or trains or boats carrying passengers; second, to property, except ordinary livestock, received for transportation concerning which the carrier shall have been or shall be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall

not, so far as relates to values, be held to be a violation of section 10 of this title; and any tariff schedule which may be filed with the commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared and agreed upon; and the commission is empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation. * * *

§ 316. Rates, fares and charges.

* * * * *

RATES, FACILITIES FOR CARRIERS OF PROPERTY

(b) It shall be the duty of every common carrier of property by motor vehicle to provide safe and adequate service, equipment, and facilities for the transportation of property in interstate or foreign commerce; to establish, observe, and enforce just and reasonable rates, charges, and classifications, and just and reasonable regulations and practices relating thereto and to the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, and all other matters relating to or connected with the transportation of property in interstate or foreign commerce.

* * * * *

UNDUE PREFERENCES OR PREJUDICES PROHIBITED

(d) All charges made for any service rendered or to be rendered by any common carrier by motor vehicle engaged in interstate or foreign commerce in

the transportation of passengers or property as aforesaid or in connection therewith shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof, is prohibited and declared to be unlawful. It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, region, district, territory, or description of traffic, in any respect whatsoever; or to subject any particular person, port, gateway, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

§ 317. Tariffs of common carriers by motor vehicle—(a) Filing, posting, and publication.

Every common carrier by motor vehicle shall file with the Commission, and print, and keep open to public inspection, tariffs showing all the rates, fares, and charges for transportation, and all services in connection therewith, of passengers or property in interstate or foreign commerce between points on its own route and between points on its own route and points on the route of any other such carrier, or on the route of any common carrier by railroad and or express and or water, when a through route and joint rate shall have been established. Such rates, fares, and charges shall be stated in terms of lawful money of the United States. The tariffs required by this

section shall be published, filed, and posted in such form and manner, and shall contain such information as the Commission by regulations shall prescribe; and the Commission is authorized to reject any tariff filed with it which is not in consonance with this section and with such regulations. Any tariff so rejected by the Commission shall be void and its use shall be unlawful.

DEVIATION FROM RATES AND REGULATIONS ENUMERATED IN TARIFF FORBIDDEN; UNDUE PREFERENCES

(b) No common carrier by motor vehicle shall charge or demand or collect or receive a greater or less or different compensation for transportation or for any service in connection therewith between the points enumerated in such tariff than the rates, fares, and charges specified in the tariffs in effect at the time; and no such carrier shall refund or remit in any manner or by any device, directly or indirectly, or through any agent or broker or otherwise, any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities for transportation in interstate or foreign commerce except such as are specified in its tariffs: *Provided*, That the provisions of sections 1(7) and 22 of this title shall apply to common carriers by motor vehicles subject to this chapter.

§ 319. Application of section 20(11) and (12) of this title to common carriers by motor vehicle.

The provisions of section 20(11) and (12) of this title, together with such other provisions of chapter 1 of this title (including penalties) as may be necessary for the enforcement of such provisions, shall apply

with respect to common carriers by motor vehicle with like force and effect as in the case of those persons to which such provisions are specifically applicable. Feb. 4, 1887, c. 104, Part II, § 219, as added Aug. 9, 1935, c. 498, 49 Stat. 563, and amended May 16, 1942, c. 318, § 3, 56 Stat. 300; Aug. 7, 1942, c. 552, § 1, 56 Stat. 746.

§ 322. Unlawful operation—(a) Violation of chapter or rules or orders; penalty where none otherwise provided.

Any person knowingly and willfully violating any provision of this chapter, or any rule, regulation, requirement, or order thereunder, or any term or condition of any certificate, permit, or license, for which a penalty is not otherwise herein provided, shall, upon conviction thereof, be fined not more than $100 for the first offense and not more than $500 for any subsequent offense. Each day of such violation shall constitute a separate offense.

PARTICIPATION IN UNJUST DISCRIMINATION; EVASION OF REGULATIONS; PENALTY

(c) Any person, whether carrier, shipper, consignee, or broker, or any officer, employee, agent, or representative thereof, who shall knowingly offer, grant, or give; or solicit, accept, or receive any rebate, concession, or discrimination in violation of any provision of this chapter, or who by means of any false statement or representation, or by the use of any false or fictitious bill, bill of lading, receipt, voucher, roll, account, claim, certificate, affidavit, deposition, lease, or bill of sale, or by any other means or device, shall knowingly and willfully assist, suffer or permit any

person or persons, natural or artificial, to obtain transportation of passengers or property subject to this chapter for less than the applicable rate, fare, or charge, or who shall knowingly and willfully by any such means or otherwise fraudulently seek to evade or defeat regulation as in this chapter provided for motor carrier or brokers, shall be deemed guilty of a misdemeanor and upon conviction thereof be fined not more than $500 for the first offense and not more than $2,000 for any subsequent offense.

Office - Supreme Court, U.S
FILED
JUL 6 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

DOCKET NO. ~~1146~~ 246

OCTOBER TERM, 1956

EMILY SHOPS, INC.,
Respondent-Plaintiff,

AGAINST

INTER-STATE TRUCK LINE, INC.,
Petitioner-Defendant.

BRIEF FOR THE RESPONDENT

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IN THE

Supreme Court of the United States

DOCKET NO. 1146

OCTOBER TERM, 1956

EMILY SHOPS, INC.,
Respondent-Plaintiff,

AGAINST

INTER-STATE TRUCK LINE, INC.,
Petitioner-Defendant.

BRIEF FOR THE RESPONDENT

Statement

Petitioner, an interstate common carrier, seeks, by this Writ of Certiorari, to review the judgment of the Supreme Court of the State of New York and the unanimous affirmance of the Appellate Division and Court of Appeals denying its attempt to invoke a limitation of liability for merchandise admittedly lost in transit.

Questions Presented by Petition for Review

The questions presented by petitioner, while couched in provocative language, are clearly not germaine to the issues inherent in the case at bar.

Respondent has consistently maintained, and the New York Courts have recognized, that the host of cases

repeatedly cited by petitioner-defendant, involving variances between published rates and rates actually charged by the carrier, are merely indicative of the purpose and intent of the National Transportation Policy (54 Stat. 889, Act of Sept. 18, 1950, C. 722, Title 1, par. 1) to establish rates and eliminate discrimination. Neither respondent, nor the courts reviewing the instant case, have disputed the principle that, in conformance with this policy, rates would be readjusted in accordance with the published tariff, upon application to the Commission or recourse to the courts. This case patently does not involve nor sanction the enforcement of discriminatory practices or the validation of illegal rates.

The basic issue in the case at bar, so clearly enunciated by the memorandum *per curiam* of the Court of Appeals, is whether a claim of limitation of liability would be enforced without an affirmative valuation by the shipper, especially where the freight charges, in addition thereto, do not consitute a rate at all but a fixed arbitrary sum.

None of the many cited cases offered by petitioner refute the doctrine so clearly enunicated in *Loeb* v. *Friedman's Express*, in which this Court denied certiorari, 331 U. S. 851 to review the judgment of the N. Y. Court of Appeals, 296 N. Y. 1029, affirming the lower courts, 187 Misc. 94, aff'd 271 A. D. 873, that no limitation of liability would be enforced unless the parties thereto, shipper as well as carrier, demonstrate, by affirmative action in writing, their intent to so do. This ruling merely enforces the provisions of the permissive section of the Carmack Amendment (Title 49 U. S. C. A. 20 (11)) and does no violate the letter, spirit or purpose of the National Transportation Policy, *supra*.

May we respectfully observe that petitioner is arguing with proverbial tongue in cheek, that the fact that the

decision of the Court of Appeals in the instant case was printed on the front page of the New York Law Journal, constitutes it as "a matter of more than individual concern." Factually, the vast majority of opinions of the Court of Appeals, a good portion of those of the Appellate Division, and numerous cases in the inferior courts, grace the front pages of the New York Law Journal. May we be permitted the observation that the shipping and transportation fraternity, in the light of the doctrine in *Loeb* v. *Friedman's Express, supra*, can reasonably expect its application in the case at bar. Uncertainty can only arise in the granting of this Writ.

Respondent's Reasons for Denial of the Writ

(1)

The state courts of New York have decided this case in conformance with the enunciated doctrine of this Court and in accordance with the provisions and intent of the Interstate Commerce Act.

The decision of the New York Court of Appeals, as clearly set forth in its memorandum *per curiam*, is the application of the doctrine of *Loeb* v. *Friedman's Express*, to the strikingly similar facts and issue in the instant case. The fact that the *Loeb* case was not only reviewed by the same Court of Appeals but that a Writ of Certiorari was denied by this Supreme Court of the United States, establishes this judicial precedent as one of ultimate authority.

In both the *Loeb* case and in the instant litigation under review, the Uniform Straight Bill of Lading, constituted the basic contract of carriage and contained the identical reference to valuation and limitation of liability.

> "NOTE—*Where the rate is dependent on value*, shippers are required to state specifically in writing the agreed or declared value of the property.
>
> The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding ..... per ....."

The carrier, in this case, added the unilateral declaration "when value is not declared, carrier will not assume any liability in excess of 50¢ per pound or $50.00 minimum." In both actions, no affirmative declaration of value was filed in by the shipper and in both instances no rate was agreed upon dependent upon value. The only charge made and agreed upon in the instant case was a flat arbitrary freight charge and no rate was fixed nor valuation contemplated between the parties.

The Court of Appeals, in the case at bar, recognized its similarity with the facts and principles inherent in the *Loeb* case and based its unanimous judgment of affirmance directly upon this ultimate authority (App. A 5).

> "Omission to mention any value of the goods in this bill of lading is non-declaration of value. The situation is that which is described in the bill of lading as occurring 'when value is not declared.' No value having been declared, the bill of lading does not constitute an agreement that the goods were worth any particular amount. Consequently any limitation upon liability of the shipper would have to be based upon a theory of estoppel. Any estoppel would need to be based upon conduct by the shipper misleading to the carrier. * * *
>
> * * * * * *
>
> It is assumed here, as in the *Loeb* case, that the bill of lading is conformed by law to the provisions

of the filed tariffs. Loeb had not paid any freight charges, yet he was allowed to recover full value. No different result is indicated here, where the shipper paid more than the freight charges corresponding in the filed tariffs to the full value of the goods."

(2)

No court, state or federal, has abrogated the rule that any released value of the property must be declared in writing by the shipper or agreed upon in writing.

Petitioner seems to urge that the doctrine enunciated in the *Loeb* case, as well as in the *per curiam* in the case at bar, constitutes a radical departure from previous judicial interpretation and from the federal statute involved herein.

None of the authorities cited by the petitioner sustain this contention. On the contrary, eloquent and conclusive refutation is found in the express terms of the statute.

Section 20 (11) of the Interstate Commerce Act (49 U. S. C.) imposes a rule of full liability notwithstanding any limitation of liability or agreement as to value with certain carefully defined exceptions. The exception involved herein relates to property which the Interstate Commerce Commission has authorized and required the carrier "to establish and maintain rates dependent upon the value *declared in writing by the shipper or agreed upon in writing as the released value of the property.*"

The requirement is clear, explicit and unequivocal.

In *Caten* v. *Salt Lake City Movers & Storage Co., Inc.*, 149 Fed. 2nd 428, the Court stated:

"* * * To permit a carrier, without any action whatever by the shipper in respect to valuation in

writing, to limit its liability on the basis of declared or released value on which the rate was charged would be to ignore entirely the statutory requirement that the shipper must make the declaration or agreement in writing and nullify that part of the proviso.

"The statute makes it abundantly clear that the carrier's common law liability for full actual damages whether or not caused by its negligence is imposed when it accepts goods for carriage, unless a certain specified agreement limiting that liability has been made as the result of an equally certain specified action by the shipper in respect to a voluntary valuation of his goods. Even then the carrier is not permitted to contract against liability for his own negligence. Only by giving the shipper an opportunity to choose between higher and lower rates based upon valuation can the carrier place the shipper who has selected a lower rate in the prescribed manner in the position where he is estopped to assert loss or damage to an amount in excess of the declared valuation upon which the rate was fixed (*Boston & Maine R. R.* v. *Piper*, 246 U. S. 439; *Hart* v. *Penn. R. R.*, 112 U. S. 331; *Union Pacific R. R.* v. *Burke*, 255 U. S. 317). Here nothing was done by the shippers which amounted to written action by them as to valuation and any agreement limiting the defendant's liability to less than the actual value was void. Therefore it was correct for the District Court to instruct the jury that the defendant was liable for the full value of the plaintiff's goods."

Thus, under the *Orton* decision, the court indicates that even where released rates are authorized by the Commis-

sion and the carrier's tariff makes proper reference thereto, the statute further requires some affirmative, direct and positive act which the court terms "written action." This "written action" constitutes a condition precedent to a carrier's right to make an effective limitation of liability.

Limitations of time, space and a due consideration of the patience of this Honorable Court does not permit us to analyze each of the cited authorities of petitioner to demonstrate their lack of application to the issue involved herein and we wish to cite *American Railway Express Company* v. *Lindenburg*, 260 U. S. 584, 592, as illustrative of the lack of application of these cases to the issue in the case at bar. In that case, the United States Supreme Court specifically indicated that in addition to the limitation valuation clause in the bill of lading, the shipper actually received the benefits of the lower rate. In the instant case, however, as the Court indicated in its opinion, the plaintiff paid a rate higher than the rate sufficient to purchase full valuation. The same situation obtained in the cited case of *Maugnin* v. *Dinsmore*, 62 N. Y. 35.

It is therefore respectfully submitted that the judgment and opinion of the New York Court of Appeals, affirming the determination of the Supreme Court of the State of New York and the Appellate Division, merely constitutes an affirmation of the express provisions and intent of the federal statute and of the clearly enunciated judicial precedent in both the state and federal courts.

CONCLUSION

Respondent respectfully prays that the petition for a Writ of Certiorari be denied, on the ground that the determination of the New York State courts is correct.

Respectfully Submitted,

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